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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

11 IN RE: HIGH-TECH EMPLOYEE
12 ANTTITRUST LITIGATION

13 THIS DOCUMENT RELATES TO:
14 ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION**

15
16 Date: January 17, 2013
17 Time: 1:30 pm
Courtroom: 8, 4th Floor
18 Judge: The Honorable Lucy H. Koh

19 **PUBLIC REDACTED VERSION**
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INTRODUCTION AND SUMMARY

Plaintiffs ask this Court to take the unprecedented step of certifying a class of 60,000 to 100,000 persons who were employed at seven companies in widely varying jobs and received vastly different compensation set by each Defendant's unique practices. Whether and to what extent any employee suffered injury as a result of the alleged "do-not-cold-call" agreements cannot possibly be determined "in one stroke" by common proof. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). Nor can the indefensible statistical methods of Plaintiffs' expert substitute for the individualized inquiries required to determine whether anyone was harmed, directly or indirectly, because certain cold calls were not made. Because Plaintiffs cannot show with "convincing proof" that common issues predominate (*id.*), the motion for class certification should be denied.

The common injury sometimes found in price-fixing cases is absent here. This case does not involve agreements to reduce hiring or to fix wages. Rather, Plaintiffs allege that certain pairs of Defendants, as part of an "overarching conspiracy," agreed not to make unsolicited cold calls to each other's employees. Each agreement restricted cold calling only between the two Defendants who were parties to it and did not limit any other cold calling. Every Defendant was free to use other methods to reach job applicants, such as advertisements, websites and employee referrals. All Defendants were also free to hire from each other and did so. As a result, the data show Defendants' hiring from each other—even between pairs of Defendants who were parties to an agreement—did not materially change before, during or after the class period.

Lacking concrete evidence of any harm, Plaintiffs advance a novel theory of indirect impact on the class that has no support in law or economics. To identify who, in the absence of the agreements, would have received a cold call and ultimately qualified for and received a new job at a higher salary would entail countless individualized inquiries. Plaintiffs try to avoid this insuperable obstacle by positing that the agreements deprived some employees of some unspecified level of "information flow" that they could have used to obtain higher salaries at their current employer or a new one. Plaintiffs claim these increased salaries would somehow ripple through the disparate compensation structures of each Defendant by means of allegedly uniform policies among all Defendants to maintain "internal equity" across all employees. The result, say Plaintiffs, is that

1 billions in additional compensation would have been paid to the class members, from production
2 assistants at a film studio to microprocessor designers at a semiconductor company.

3 Plaintiffs' theory of class-wide impact is fundamentally flawed from beginning to end. First,
4 the theory cannot avoid the individualized factual inquiries inherently required to determine whether
5 any injury has occurred and to whom – inquiries that have consistently led courts to deny class
6 certification in wage suppression antitrust cases. (See pp.11-14, *infra*.) For example, Plaintiffs
7 assume that, absent the agreements, Adobe employees such as Plaintiff Brandon Marshall would
8 have received cold calls from Apple that would have provided information about the market value
9 of their labor. Plaintiffs further assume they would have used the information to negotiate higher
10 pay, which would then propagate through all jobs at Adobe. But determining whether this would
11 have happened involves myriad individualized factual issues, such as the performance and
12 qualifications of employees receiving the calls and their co-workers, Adobe's budget constraints and
13 compensation practices, and the ability and willingness of managers to offer more pay. These
14 individualized issues increase exponentially as the analysis extends to the tens of thousands of
15 employees in widely disparate jobs at seven companies. The experience of the named Plaintiffs is
16 instructive. Although they have received hundreds of cold calls, not one Plaintiff ever negotiated a
17 higher salary at an existing employer based on a cold call or claimed to have been awarded a raise
18 because a co-worker had received such a call.

19 Second, Plaintiffs' theory assumes that each Defendant was able to suppress its employees'
20 compensation by limiting cold calls from one or more other Defendants. But neither Plaintiffs nor
21 their expert claims the agreements had any impact whatsoever on the overall demand or supply for
22 employees' services. Nor could they. Defendants are only a tiny fraction of employers competing in
23 vast, disparate labor markets, and Defendants hired only 1% of their employees from each other—
24 before, during and after the period of the alleged agreements. Using the example above, Adobe
25 could not reduce the compensation of its employees below market levels simply because Apple
26 allegedly agreed not to cold call them. Scores of other competitors would offer market rates and
27 hire away Marshall and his co-workers, as Plaintiffs' expert acknowledges. Nor is there any
28 allegation or evidence that the agreements reduced Defendants' overall recruiting activity. Any

1 company would simply use recruiting methods other than cold calling and redirect its cold calling to
2 Defendants with which it had no agreement as well as to the rest of the market where it finds 99%
3 of its employees.

4 Third, Plaintiffs' theory of class-wide impact rests on a critically flawed assumption: that all
5 Defendants were so concerned with "internal equity" that an increase in one employee's
6 compensation would automatically drive raises for all employees across all job categories. Plaintiffs
7 assume Defendants use compensation systems more rigid than the military or civil service—yet so
8 sensitive that a tiny increase in cold calls would elevate compensation for all employees. Undisputed
9 facts contradict this assumption. Defendants' compensation policies and practices varied greatly,
10 but all were highly individualized and emphasized pay for performance; none followed Plaintiffs'
11 theorized "rigid wage structure." Pay for a single job classification could vary by 100% or more for
12 myriad reasons, and there were thousands of job classifications.

13 Fourth, Plaintiffs' theory fails to account for class members who, by Plaintiffs' allegations,
14 directly benefited from the alleged agreements. Returning to the above example, if Apple did not
15 cold call Marshall for a position, Apple filled that job with someone else. That person is a member
16 of Plaintiff's proposed class and yet benefited from the no cold call agreement. Plaintiffs offer no
17 way to distinguish class members who benefited from those who did not. Indeed, all but one named
18 Plaintiff are such beneficiaries because they joined a Defendant during the time of an alleged
19 agreement and, under Plaintiffs' theory, faced less competition for the position because that
20 Defendant allegedly was not cold calling employees of other Defendants.

21 Lacking factual support, Plaintiffs rely on statistical models from their expert, Dr. Edward
22 Leamer. Because Leamer's analysis is rife with fundamental errors and contrary to the evidence,
23 Defendants have moved to strike it under *Danbert*. Even if the Court admits his opinions, Leamer's
24 work does not establish predominance of common issues. Leamer uses a regression model to
25 suggest the agreements had an average effect across the entire class, and then purports to translate
26 the average into common proof of class-wide impact and damages. But an average "masks the
27 differences and by definition glides over what may be important differences," and it "sweep[s] in an
28 unacceptable number of uninjured plaintiffs." *In re Graphics Processing Units Antitrust Litig.*, 253

1 F.R.D. 478, 494, 504 (“GPU”) (N.D. Cal. 2008). Leamer’s averages do just that. If one runs
 2 Leamer’s model disaggregated for each Defendant, it concludes that some Defendants *overcompensated*
 3 their employees as a result of the alleged agreements—a result flatly contrary to Plaintiffs’ theory
 4 that the agreements suppressed the compensation of all Defendants’ employees.

5 In short, Plaintiffs’ motion ignores the individualized factual issues that must be resolved to
 6 determine who was injured and the extent of injury caused by the alleged agreements. Plaintiffs’
 7 profoundly flawed statistical analysis assumes, rather than demonstrates, predominance of common
 8 issues. Because Plaintiffs’ motion cannot survive the rigorous analysis required by Rule 23(b)(3),
 9 class certification must be denied.

10 BACKGROUND

11 A. The Putative Class and Plaintiffs’ Allegations.

12 Plaintiffs seek certification of an “All-Employee” class comprising every salaried, non-retail
 13 employee (below an undefined “senior executive” level) at every Defendant throughout the five-year
 14 class period. Alternatively, Plaintiffs seek a class of salaried employees in “technical, creative,
 15 and/or research and development” fields. Mem. at 1. Both classes are exceptionally broad. The
 16 first includes over 100,000 employees with 7,000 job titles. Expert Report of Professor Kevin M.
 17 Murphy (“Murphy Rept.”) fn. 130. The second includes almost 60,000 employees with 2,400 job
 18 titles. *Id.* Plaintiffs offer the same flawed methodology to support both classes. They offer no
 19 explanation for the narrower class, and Leamer could identify no objective reason for it. Brown
 20 Decl. Ex. 1 (“Leamer Dep.”) 163:19-164:24, 166:19-168:20.

21 Plaintiffs allege that each Defendant entered into a separate, bilateral agreement with one or
 22 more other Defendants not to make unsolicited “cold calls” to each other’s employees. Each
 23 alleged agreement restricted only the two parties to that agreement, and the number of agreements
 24 differed from Defendant to Defendant. Adobe, for example, allegedly had an agreement only with
 25 Apple. Thus, Adobe was free to cold call every Defendants’ employees other than Apple’s, and all
 26 Defendants other than Apple could cold call Adobe’s employees.

27 The alleged cold calling restrictions did not limit other recruiting methods or prohibit hiring.
 28 Defendants could and did advertise open positions on websites and elsewhere, respond to inquiries

and referrals, and consider any applicant from any company. Brown Decl. Ex. 7 (“Vijungco Dep.”) 210:24-211:4; Brown Decl. Ex. 15 (“Vijungco Decl.”) ¶ 29; Brown Decl. Ex. 8 (“Bentley Dep.”) 221:6-11. The low level of hiring by Defendants from other Defendants was not materially different before, during or after the class period. Murphy Rept. Exs. Table 1, Ex. 1A-B.

Plaintiffs claim that, but for the alleged agreements, some employees of Defendants would have received more cold calls. Some of those hypothetical cold calls allegedly would have led to information about the employees’ “labors’ values.” Complaint ¶ 46. These employees could have increased their compensation by accepting an offer with a higher salary or negotiating greater compensation at their current employer. *Id.* These employees would also tell their co-workers, who could “use the information themselves to negotiate pay increases” or change jobs. *Id.* ¶ 47; Expert Report of Edward E. Leamer (“Leamer Rept.”) ¶¶ 113-14.

Although Plaintiffs rely on the Department of Justice’s investigation, the DOJ did not suggest the alleged agreements affected the compensation of all employees across-the-board at each Defendant, much less that any such effect could be shown with common proof.¹

B. Defendants’ Businesses and Labor Forces.

The seven Defendants are in very different businesses and have diverse labor needs. Their principal businesses include semiconductors (Intel), visual effects, sound engineering, and video games (Lucasfilm), animated movies (Pixar), financial and tax preparation programs (Intuit), web search and information organization technologies (Google), consumer computer products and software (Apple), and digital media and marketing software (Adobe).

Defendants’ employees span more than 7,000 job titles, ranging from attorneys to software engineers to creative designers to auditors. Plaintiffs’ proposed classes include employees who could

¹ A company may have many reasons unrelated to compensation to decide, or even agree, not to cold call another’s employees. For example, a company might want, or even have a legal obligation, to avoid actively recruiting from a collaboration partner, from a business it has divested, or from a company one of its Board members leads. As the DOJ consent decree recognizes, companies are permitted under the antitrust laws to agree not to recruit from each other (or even to not hire from each other) for a variety of reasons. DOJ’s theory—which Defendants dispute—was that the agreements were “overly broad” because, for example, they encompassed more employees or geographical areas than DOJ deemed “reasonably necessary.” Shaver Decl. Ex. 71 at 9. If the case were to proceed, Defendants would demonstrate that the agreements should be evaluated under the rule of reason, were reasonable and lawful under that standard, and could not have conceivably had any adverse effect on compensation in any relevant labor market.

1 work at many types of companies (*e.g.*, accountants, receptionists) and highly specialized employees
 2 with skills that make them unsuitable for working at any other Defendant (*e.g.*, story artists at Pixar,
 3 consumer tax professionals at Intuit).

4 Plaintiffs do not claim that compensation paid by Defendants was insulated from the
 5 broader labor markets, or that Defendants could influence the demand for or supply of employee
 6 services in those markets. Defendants represented only a tiny fraction of employers in the vast labor
 7 markets in which they competed (however those markets are defined), which included scores of
 8 non-defendants such as Microsoft, Amazon, eBay, AMD, Applied Materials, IBM, Hewlett-Packard,
 9 Cisco, Oracle, Yahoo, Motorola, Electronic Arts, LinkedIn, and untold numbers of start-ups and
 10 non-technology companies. In fact, only about 1% of Defendants' total hiring in either proposed
 11 class came from other Defendants, including while the agreements were not in effect. *See* Murphy
 12 Rept. ¶ Table 1. Plaintiffs do not explain how Adobe, for example, could attract and retain its
 13 administrative assistants or software engineers by paying them less than market rates simply because
 14 Apple agreed not to cold call them. Under Plaintiffs' theory, those employees would leave Adobe
 15 for other employers or use job offers from those companies to bid up their salaries at Adobe.

16 C. Defendants' Compensation Practices.

17 Plaintiffs assert that Defendants had "somewhat rigid wage structures" under which pay
 18 increases to any employees would result in higher pay across-the-board for all employees. Leamer
 19 Dep. 200:1-17. The evidence is to the contrary. Each Defendant's compensation practices are
 20 different, but they do share one crucial characteristic: Defendants set the specific amounts paid to
 21 each employee on an individualized and decentralized basis largely reflecting the performance of that
 22 employee. [REDACTED]

23 [REDACTED].² [REDACTED]
 24 ² Brown Decl. Ex. 25 at 28 [REDACTED]
 25 [REDACTED]; Brown Decl. Ex. 14 ("Morris Decl.") Ex. 2 at 5 [REDACTED] Brown Decl.
 26 Ex. 19 ("Stubblefield Decl.") Ex. A at 9 [REDACTED]
 27 [REDACTED]; Brown Decl. Ex. 17 ("McKell Decl.") ¶ 9 [REDACTED]
 28 [REDACTED]; Brown Decl. Ex. 26 at 4 [REDACTED]
 [REDACTED] Burmeister Decl. ¶ 3 [REDACTED]
 [REDACTED] Brown Decl. Ex. 22 ("Maupin Decl.") ¶ 30

(cont'd)

1 [REDACTED] *See, e.g.*, Brown Decl. Ex. 16 (“Burmeister
 2 Decl.”) ¶ 7. Defendants’ compensation data reflect their individualized compensation systems, with
 3 large variations in employee pay even among employees in the same job classification with similar
 4 experience. Murphy Rept. ¶ 94 & Exs. 14A-B.

5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]. *See, e.g.*,
 8 Stubblefield Decl. ¶ 14. [REDACTED]

9 [REDACTED] Morris Decl. ¶ 14. [REDACTED]
 10 [REDACTED]
 11 *See, e.g.*, Morris Decl. ¶ 22 (Adobe); Burmeister Decl. ¶ 7 (Apple), Brown Decl. Ex. 23 (“McAdams
 12 Decl.”) ¶ 15 (Pixar). [REDACTED]
 13 [REDACTED]
 14 [REDACTED]

15 [REDACTED] *See* Morris Decl. ¶ 32; Burmeister Decl. ¶ 9.

16 Some Defendants set broad base compensation ranges for certain jobs, leaving managers
 17 broad discretion to vary individual compensation, often by 100% or more. The ranges resulted in
 18 substantial variation in pay between employees, even within the same job classification. [REDACTED]
 19 [REDACTED]

20 [REDACTED] McAdams Decl. ¶ 9. [REDACTED]
 21 [REDACTED]. McKell Decl. ¶ 10; Leamer
 22 Dep. 467:12-470:3. [REDACTED]

23 [REDACTED]. Burmeister Decl., Ex. B at 1. [REDACTED]
 24 [REDACTED]

25 Brown Decl. Ex. 21 (“Wagner Decl.”) ¶¶ 13, 30. [REDACTED]
 26 [REDACTED]. Morris Decl. ¶ 12. [REDACTED]
 27 [REDACTED]

28 [REDACTED] McAdams Decl. ¶ 10 (at Pixar, “a particular employee’s compensation level within a base
 salary range has been dependent on that employee’s experience and performance level”).

1 [REDACTED] Stubblefield Decl. ¶ 10.

2 Most Defendants offered bonuses and equity grants as additional compensation. Like base
3 pay, the amounts awarded were individually determined, based principally on the employee's
4 performance and often also on how the business group or overall company performed. Bonuses
5 and equity grants have a substantial and varying effect on employees' compensation. Bonuses at
6 Pixar are tied to the success of individual films. McAdams Decl. ¶ 18. [REDACTED]

7 [REDACTED]
8 [REDACTED]. Leamer Rept. at ¶ 132 (Fig. 16).

9 Defendants also varied in how they handle counteroffers to employees who had offers from
10 other companies. [REDACTED]

11 [REDACTED]s. McAdams Decl. ¶ 23; McKell Decl. ¶ 11; Maupin Decl. ¶ 30. [REDACTED]

12 [REDACTED]. Morris Decl. ¶¶ 29-30; Stubblefield Decl. ¶¶ 6-8. [REDACTED]

13 [REDACTED]
14 [REDACTED] *E.g.*, Morris ¶ 31; McAdams ¶ 23; McKell ¶ 13.

15 **D. Named Plaintiffs.**

16 The named Plaintiffs are five former employees of four Defendants. They testified they
17 were qualified to (and did) work for a "very, very, very, very broad range of companies." Brown
18 Decl. Ex. 3 ("Fichtner Dep.") 18:3-7; *accord* Brown Decl. Ex. 6 ("Stover Dep.") 238:11-17, 240:25-
19 241:3 ("could work a lot of different places" and had "relatively broad" opportunities); Brown Decl.
20 Ex. 2 ("Devine Dep.") 93:9-10, 96:2-98:20 ("any market domain," including "any type of company
21 that needed software engineering expertise" and "most" financial services companies). Collectively
22 they have worked for 41 other employers that compete with Defendants to hire employees,
23 reflecting the breadth and diversity of labor markets of just a few employees. *See* Brown Decl. Exs.
24 9-13 (Devine, Fichtner, Hariharan, Marshall, and Stover Interrog. Resps.) No. 4.

25 Plaintiffs' work histories show highly individualized backgrounds, qualifications and
26 preferences. Michael Devine has had over 17 jobs with tech and non-tech companies in various
27 industries. Devine Interrog. Resp. No. 4. He worked in Seattle for Adobe for a year and a half from
28 2006 to 2008. *Id.* During the class period, including while working at Adobe, [REDACTED]

1 [REDACTED]
 2 [REDACTED]. Devine Dep. 137:13-138:19, 231:21-233:24. [REDACTED]

3 [REDACTED]. *Id.* 230:13-19.

4 Siddharth Hariharan works on video games and has not held a job focused on anything else.
 5 Brown Decl. Ex. 4 (“Hariharan Dep.”) 65:14-23. He worked at Lucasfilm for 20 months in 2007-
 6 2008. *Id.* 165:10-15. Although he believed Lucasfilm did not offer him a market rate given his skills
 7 and experience, he took the job anyway because he found other aspects of the position attractive.
 8 *Id.* 125:12-18, 154:22-155:5. He now lives in Canada and is self-employed. *Id.* 16:12-18:24.

9 Brandon Marshall has worked at 14 different jobs in the last 15 years, jobs he found mostly
 10 through employment agencies. Marshall Interrog. Resp. No. 4. All but one job lasted less than a
 11 year; his job at Adobe lasted only four months. *Id.* [REDACTED]
 12 [REDACTED] e. Brown Decl. Ex. 5 (“Marshall Dep.”) 138:18-23.

13 Mark Fichtner worked for Intel as a software engineer for 16 of the last 19 years in Phoenix,
 14 Arizona. Fichtner Interrog. Resp. No. 4. He moved to Utah in 2007 to work at Utah State
 15 University, but moved back to Phoenix a few months later when he could not sell his house there.
 16 Fichtner Dep. 125:22-126:6. He took a job at Intel again because the “offer value was fair” and his
 17 move back to Phoenix was “urgent.” *Id.* 149:20-25.

18 Daniel Stover worked for Intuit from 2006 to 2009 as a software engineer. Stover Dep.
 19 146:4-9. He recently left the software field and works in Seattle as a cabinet maker. *Id.* 11:19-12:9.

20 Plaintiffs found their dozens of jobs through various means and only rarely through cold
 21 calls. The most common were friends’ recommendations, online postings and recruiting websites.
 22 Brown Decl. Exs. 9-13. Together, Plaintiffs received hundreds of cold calls from Defendants and
 23 non-defendants (including during the class period), but in most cases they chose not to pursue them.
 24 *E.g.*, Stover Dep. 201:21-202:9. It was unusual for a cold call to contain compensation information,
 25 *id.* 208:2-10, and Devine considered it an unreliable source of information, Devine Dep. 143:23-
 26 146:23. Marshall received so many cold call emails he set up a spam filter to block out a recruiters’
 27 emails. Marshall Dep. 337:21-338:14. Fichtner also considered them mostly spam. Fichtner Dep.
 28 90:7-8. A Google recruiter called Hariharan while he was at Lucasfilm, but he said he was fine

1 where he was. Hariharan Dep. 174:12-24. The recruiter mentioned no specifics about the job. *Id.*
 2 175:5-11. Hariharan does not recall discussing the call with his supervisor because he did not
 3 believe he could get a raise based on the call. *Id.* 185:13-16.

4 No named Plaintiff ever negotiated a salary increase at his current employer based on a cold
 5 call. Nor did any Plaintiff claim to have received a raise as the result of an offer made to another
 6 employee, from a cold call or otherwise, before, during, or after the class period. [REDACTED]

7 [REDACTED]. Hariharan Dep. 80:10-
 8 91:9; Stover Dep. 220:12-20; Fichtner Dep. 18:3-7. Plaintiffs admitted they were aware of
 9 competitive salary levels from multiple sources, including friends, contacts at other companies, and
 10 websites. *E.g.*, Fichtner Dep. 45:15-46:9; Marshall Dep. 122:12-123:4.³

11 ARGUMENT

12 A “trial court must conduct a ‘rigorous analysis’ to determine whether the party seeking
 13 certification has met the prerequisites of Rule 23.” *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588
 14 (9th Cir. 2012). Plaintiffs bear the burden of “affirmatively demonstrating” by a preponderance of
 15 the evidence, *id.*, that “the class members ‘have suffered the same injury.’” *Dukes*, 131 S. Ct. at 2551.
 16 Under Rule 23(b)(3), the common questions must predominate over individualized ones, a
 17 “criterion” that is “far more demanding” than establishing a single common question under Rule
 18 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

19 Contrary to Plaintiffs’ suggestion (Mem. at 4), this Court “*must* consider the merits” to the
 20 extent that they overlap with class certification issues and must “resolve the critical factual disputes”
 21 bearing on certification based on the record today. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981
 22 (2011); *see Dukes*, 131 S. Ct. at 2551-52. Plaintiffs must make more than a “plausible” showing of a
 23 method that is “capable of” establishing class-wide impact. Mem. at 15-16. Plaintiffs cannot satisfy
 24 their burden with “promises” (GPU, 253 F.R.D. at 506-07) to “provide solutions” to prevent the

25 ³ One other trait common to all plaintiffs (except Fichtner) is that they falsified their qualifications
 26 when seeking new employment. When he applied to Lucasfilm, Hariharan inflated his salary at his
 27 then-current employer by more than 15%. Hariharan Dep. 138:8-9. Marshall repeatedly listed false
 28 dates on his resume regarding his past employment and exaggerated his work experience. Marshall
 Dep. 155:9-157:14, 182:16-184:12, 202:5-204:3. Stover misrepresented his dates of employment on
 his resumes. Stover Dep. 105:12-108:5, 113:5-114:5. Devine added to his resume a Bachelor of
 Fine Arts degree that he has not earned. Devine Dep. 172:18-24.

“individual issues from splintering the action.” *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974). Plaintiffs’ method of class-wide proof must “work,” not merely be “workable.” *Reed v. Advocate Health Care*, 268 F.R.D. 573, 593 (N.D. Ill. 2009). To that end, class certification requires “convincing proof” that Rule 23 is actually satisfied. *Dukes*, 131 S. Ct. at 2551, 2556.

I. THE PROPOSED CLASS DOES NOT SATISFY RULE 23(b)(3)’S PREDOMINANCE REQUIREMENT BECAUSE NEITHER ANTITRUST IMPACT NOR DAMAGES CAN BE PROVEN ON A CLASS-WIDE BASIS.

A. Plaintiffs Must Demonstrate That Impact to Each Class Member Can Be Established by Common Proof.

“Proof of injury is an essential substantive element” of an antitrust claim. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233 (9th Cir. 1974). An employee who was not injured cannot establish liability. *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 & n.12 (5th Cir. 2003). In a proposed class action, plaintiffs’ methodology must show that “each member of the class was in fact injured.” *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008). Thus, “[i]n antitrust class actions, common issues do not predominate if the fact of antitrust violation *and* the fact of antitrust impact cannot be established through common proof.” *Id.* at 20; *GPU*, 253 F.R.D. at 484-87. If an “individualized case must be made for each member” of the class, then common questions do not predominate. *Mazza*, 666 F.3d at 596. “In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)’s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008).⁴

B. This Court Should Follow a Long Line of Cases Denying Class Certification in Wage-Suppression Cases Because Individualized Issues Predominate.

In *Dukes*, the Supreme Court held that a class could not be certified in an employment discrimination case where the challenged employment decisions were the product of the

⁴ Plaintiffs suggest their burden is lighter because this is an antitrust case. Mem. at 6-7. To the contrary, even in price-fixing cases, which are several steps removed from this case, a court must not “relax its certification analysis, or presume a requirement for certification is met, merely because” the plaintiff asserts an antitrust claim. *Hydrogen Peroxide*, 552 F.3d at 322. The Advisory Committee Notes to Rule 23 caution that “concerted antitrust violations may or may not involve predominating common questions.”

1 discretionary decisions of individual managers. Plaintiffs face the same problem here. They have
 2 failed to offer any credible proof, much less “convincing proof,” *Dukes*, 131 S. Ct. at 2556, that
 3 compensation for tens of thousands of employees at seven different companies—employees earning
 4 from \$40,000 to over \$1 million—would have moved in lockstep rather than at the discretionary
 5 decisions of thousands of individual managers.

6 In light of the individualized issues inherent in wage-setting, courts regularly deny class
 7 certification in a wage-suppression antitrust cases. In *Weisfeld v. Sun Chemical Corp.*, 210 F.R.D. 136
 8 (D.N.J. 2002), *aff’d*, 84 F. App’x 257 (3d Cir. 2004), the plaintiffs alleged agreements among
 9 defendants *not to hire* each other’s employees. The defendants were dominant market participants
 10 that collectively had market power. The Third Circuit affirmed the district court’s conclusion that
 11 “common issues do not predominate” because the class members’ positions “var[ie]d] widely in
 12 terms of skill requirements and responsibility,” as did “the employee’s salary history, educational and
 13 other qualifications; the employer’s place of business; the employee’s willingness to relocate to a
 14 distant competitor; and [employees’] ability to seek employment in other industries.” *Id.* at 263-64 &
 15 n.4. The reasoning in *Weisfeld* compels denial of class certification here. Defendants have nothing
 16 remotely close to market power in any labor market and therefore no conceivable ability to suppress
 17 market compensation. Moreover, unlike in *Weisfeld*, the challenged agreements here did not prohibit
 18 hiring. The individualized inquiries pose even greater obstacles here given the vast differences
 19 among job categories, class members, and Defendants’ compensation practices.

20 *Fleischman v. Albany Medical Center*, 2008 WL 2945993 (N.D.N.Y. July 28, 2008), alleged a
 21 conspiracy to suppress wages by exchanging compensation information. The court concluded that
 22 “the wage of a particular nurse or class of nurses ... involve[s] too many variables” to permit “class
 23 certification on the issue of injury-in-fact.” *Id.* at *6. Those variables included “services provided,”
 24 “compensation and recruiting strategies,” “performance and merit,” “experience, tenure, job title,”
 25 “education and training,” “part-time versus full-time employment status, and alternative
 26 employment opportunities.” *Id.* at *6-7. Those same variables are not only present here, they are
 27 compounded given the thousands of job categories at issue.

28 *Reed v. Advocate Health Care*, 268 F.R.D. 573 (N.D. Ill. 2009)—another conspiracy to suppress

wages case—followed *Fleischman* in holding that “substantial variation in the compensation of the individual” employees “prevent[ed] class certification as to the issue of common impact” or damages. *Id.* at 591-92. Similarly, in a case involving an alleged conspiracy to depress wages by information sharing, the court concluded that “individual rather than common issues predominate,” noting that “employee ability to seek employment in other industries, salary history, educational and other qualifications are but a few of many factors that cannot be shown with common proof.” *In re Comp. of Managerial, Prof'l, & Technical Emps. Antitrust Litig.*, 2003 WL 26115698, at *4 (D.N.J. May 27, 2003) (“MPT”). The court also noted that because the relevant job markets would differ for each of the many different job descriptions encompassed in the class, not all class members would be “affected by the conspiracy in the same way” because “different types of employees will differ in how they must show the interchangeability among employers.” *Id.* (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 202 n.5 (2d Cir. 2001)). The same is true here. Plaintiffs make no attempt to prove that the seven Defendants constitute the relevant labor market for any of the thousands of different jobs.

Ignoring all of these cases, Plaintiffs cite *Johnson v. Arizona Hospital & Healthcare Association*, 2009 WL 5031334, at *9-11 (D. Ariz. July 14, 2009). Mem. at 16. There the court certified a class of “per diem” nurses on a claim that defendant hospitals directly fixed the rate that they paid nursing agencies. Plaintiffs omit that the same decision denied certification of a proposed class of “traveling” nurses based on “the lack of uniformity among the members of the proposed class,” “the fact that traveling nurses often negotiate” their pay; the “individualized nature of [their] compensation and benefits,” and other individual issues, which “mean[t] that antitrust impact cannot be shown effectively with common proof.” *Id.* at *9. The facts of this case are far closer to the individualized compensation for traveling nurses than to the fixed rate card applicable to per diem nurses.

For the same reasons courts denied certification in the wage suppression cases discussed above, the Court should deny certification here. Any effort to show injury from the no cold-call agreements necessarily requires individualized inquiry into the specific circumstances of each class member. Indeed, the facts are even less conducive to certification here. Defendants comprise a tiny fraction of any relevant labor markets, whereas defendants in many of the above cases dominated the relevant market. And this case involves a vastly larger and more varied set of jobs than the

1 above cases, which often involved only a few positions in one industry.

2 The named Plaintiffs alone show the wide variation in employee qualifications and
3 circumstances. *Weisfeld*, 84 F. App'x at 263-64. [REDACTED]

4 [REDACTED]
5 [REDACTED]. The factfinder would
6 have to examine each employee's situation to determine, among other things, whether the position
7 for which the employee missed the cold call matched his qualifications and experience, whether the
8 company would have offered a higher salary, whether the position was in the right geography, and
9 whether the employee was in a position to negotiate a higher salary with his existing employer.⁵

10 Beyond trying to show that *someone's* salary was reduced by a missed cold call, Plaintiffs
11 would face the impossible task of showing with common evidence that a raise for one employee
12 would produce raises for all employees. Because managers make the compensation decisions, this
13 inquiry would have to examine how an individual manager would handle the situation in light of the
14 companies' policies to pay for performance by differentiating among employees. Managers' fixed
15 compensation budgets suggest that an improved salary for one employee would *adversely* affect
16 others' salaries under the same manager. And there is no common evidence to help Plaintiffs make
17 the leap from a salary increase for someone in the accounting department to the salaries of software
18 engineers, in-house counsel, or receptionists. It is simply impossible to conduct this inquiry on a
19 class-wide basis with common evidence. *MPT*, 2003 WL 26115698, at *4 (denying certification
20 based on the "many factors" affecting the "fact of injury").

21 **C. Plaintiffs' Theory of Class-Wide Impact Rests on Demonstrably False**
22 **Assumptions and Fails to Establish Predominance of Common Issues.**

23 **1. Plaintiffs ignore the vast labor markets in which Defendants compete**
24 **relative to the minimal alleged restrictions on recruiting.**

25 A plaintiffs' proposed method for showing class-wide impact cannot support certification if
26 it ignores the facts and markets in which the defendants operate. *See GPU*, 253 F.R.D. at 494-97

26 ⁵ Proving impact would also involve analyzing the relevant labor market for each employee, which
27 would require examining the job opportunities at other companies and industries. *Weisfeld*, 210
28 F.R.D. at 142, 144; *MPT*, 2003 WL 26115698, at *3-*4; 2006 WL 38937, at *6-10. The relevant job
market for attorneys is different from the market for accountants, and the market for software
engineers is different from the market for animators.

(denying certification where plaintiffs’ expert ignored differences among products and purchasers in the market); *Fleischman*, 2008 WL 2945993, at *7 (denying certification on the issue of injury-in-fact where plaintiffs’ expert failed to account for variations in the market and ignored “differences over time”); *Reed*, 268 F.R.D. at 592-93 (expert’s failures to account for differences in real-world wages were “structural” flaws that doomed “any method of proving common impact”).⁶ Here, Plaintiffs’ theory of generalized class-wide impact fails because it does not take into account obvious and fundamental characteristics of the markets from which Defendants hire employees.

Although “information flow” is the heart of Plaintiffs’ case, neither they nor their expert has measured whether the alleged no cold-call agreements actually reduced any information to Defendants’ employees. Leamer Dep. 52:11-54:3. In fact, Defendants’ employees faced a torrent of information about market salaries from literally hundreds of other employers and the thousands of new hires annually made by Defendants. None of that information was reduced in the slightest by no cold-call agreements. Leamer admitted that price discovery “was going on each and every day.” Leamer Dep. 109:3-6. Whether foregone calls actually resulted in a loss of information not already available to an employee would depend on individualized circumstances. Murphy Rept. ¶¶ 56-63, 66; Leamer Dep. 90:19-93:24.

Leamer admitted there are “many, many more potential employers for class members than these seven defendants.” Leamer Dep. 45:1-48:23, 50:11-53:5, 60:4-21, 79:3-18. As one named Plaintiff put it, “can I get a great software job? Yes. I can pretty much get in anywhere.” Fichtner Dep. 17:18-19. This was true not just for software engineers. Defendants’ other employees, such as accountants and marketing personnel, could work at *any* company that hires for such positions.

Defendants’ hiring data confirm as much. Defendants’ employees came from hundreds of different competitors. The evidence shows that—even when the agreements were not alleged to be in effect—Defendants hired about 99% of their work force from non-defendant sources not even arguably affected by the alleged no cold-call agreements. Murphy Rept. ¶ 60, Table 1. Moreover, on average, Defendants’ turnover and hiring rate was exceptionally large—about 20% *every year*, out of a

⁶ Plaintiffs’ failure to define or take into account any of the vast and multiple labor markets in which Defendants compete for employees makes common proof of impact impossible. See *MPT*, 2003 WL 26115698 at *3-*4; 2006 WL 38937, at *6-10.

1 workforce of about 100,000. *Id.* ¶ 36.

2 Without offering any supporting evidence, Plaintiffs assume that a no-cold-call agreement
3 between two Defendants would preclude information regarding market values for employees’
4 services that was unavailable from other sources. But the enormous employee movement to and
5 from non-defendant companies meant that Defendants and their employees had a wealth of market
6 salary information throughout the relevant period. Defendant’s employees continued to receive
7 information from hundreds of non-defendant companies against which Defendants compete for
8 labor as well as from Defendants with which no agreements allegedly existed. Employees gained
9 such information from colleagues at other firms, job postings, salary surveys, and websites like
10 monster.com and hotjobs.com that post salary information. Murphy Rept. ¶¶ 41, 64-65.

11 The admitted experience of the named Plaintiffs is also contrary to Plaintiffs’ assumption.
12 The named Plaintiffs admitted they received cold calls from many companies during the class period
13 and were well aware of—and exploited—other channels of “price discovery.” Marshall— who
14 blocked some recruiters with a spam filter—changed jobs eight times between 2005 and 2008 alone,
15 and his primary ways to find job opportunities were to “look online and to network with associates.”
16 Marshall Dep. 135:19-21, 337:21-338:14. Devine disregarded cold calls and instead looked for jobs
17 by networking with co-workers and professional contacts and visiting job and company websites.
18 Devine Dep. 143:23-146:23, 132:15-142:7. Likewise, Stover had “[n]o desire at all” to engage cold
19 callers, and used co-workers, professional contacts, and internet resources like LinkedIn for
20 information about job opportunities. Stover Dep. 201:21-203:11, 176:2-178:10. *See also* Fichtner
21 Dep. 45:18-47:5 (discussing online and personal sources used for job information).

22 Plaintiffs cannot even show the alleged no cold-call agreements reduced “information flow”
23 *among Defendants*. Leamer “assumes” that such information flow was lower during the class period
24 than before or after, but he has done nothing to actually measure it. Leamer Dep. 52:11-54:3, 86:18-
25 87:23; *see* Murphy Rept. ¶¶ 55-59, 63. On the contrary, the amount of hiring cross-hiring among
26 Defendants—the presumptive fruit of all recruiting activity, including cold calling—shows no
27 meaningful reduction. Defendants continued to hire from each other at roughly the same minimal
28 rate during the class period as they did before and after. Given Defendants’ mobile and tech-savvy

workforce, it is unsurprising that the alleged no cold-call agreements did not affect cross-Defendant hiring. If an employee was interested in working at any Defendant, all she had to do was ask.

The vast labor markets and resulting enormous flow of information that continued unrestrained by the alleged agreements swamps any lost cold calls and precludes generalized wage suppression, regardless of whether one or more particular individuals may have lost job opportunities. Murphy Rept. ¶¶ 26-31, 60-62. As Leamer admitted, it is precisely because Defendants competed in a broad labor market that their salaries had to remain competitive in order to avoid “losing valuable employees” to other hiring companies who were overwhelmingly not Defendants. Leamer Dep. 85:19-86:3. Intel, for example, could not, as Leamer claims, pay all of its employees below-market wages based on a no cold-call agreement affecting 0.1% of its overall competition for labor. Leamer Rept. Fig. 22. Intel’s competitors would simply hire away its employees. Murphy Rept. ¶¶ 56-65 & op. 1. When confronted with this absurdity, Leamer could not “produce a story that would justify” it. Leamer Dep. 401:8-10. No such story exists. The class cannot be certified based on a theory that is so contrary to basic economic rationality that even Plaintiffs’ expert cannot justify it.

2. Plaintiffs’ assertion of “rigid” pay structures and across-the-board salary changes is false.

Plaintiffs assert that Defendants each used a rigid and “highly structured compensation systems” under which a pay raise to one or a few employees resulted in an across-the-board pay raise to all employees, without regard to what jobs they held, what departments they worked in, who their managers were, how experienced they were, how well they were performing, or any other individual consideration. Leamer Rept. ¶¶ 121-22; Leamer Dep. 124:7-125:8, 146-147. This assertion is the linchpin of their effort to “establish that [their] theory can be proved on a classwide basis,” *Dukes*, 131 S. Ct. at 2555, because “all or nearly all” were affected. *Dukes* requires “convincing proof” that the assertion is true. *Id.* at 2556. In fact, it is demonstrably false.

a. Defendant’s compensation policies and practices were highly individualized with wide variation in compensation and compensation changes.

Far from being uniform or rigid, Defendants’ compensation practices were both different

1 from each other and highly individualized—as one would expect given their very different
 2 businesses and the immense variety in the skills, experience, education, and job duties among their
 3 workforces. As discussed above (*supra*, pp. 6-8), [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED].⁷

11 Defendants’ actual compensation data confirm the individualized nature of Defendants’
 12 compensation schemes. Individual employee pay varied significantly, even within a given job
 13 classification, Murphy Rept. ¶¶ 90, 93-95 & Exs. 14A-B, and even more so between job titles, *id.* ¶
 14 43-44 & App’x 16A-D. Employees could and did receive large changes in compensation that were
 15 not matched by similar changes for peers even with the same job title. *Id.* ¶ 55. These kinds of
 16 individualized compensation determinations, and the resulting variations in compensation, give rise
 17 to precisely the sort of individual impact issues that have led courts to deny class certification of
 18 wage-suppression claims like this one. The evidence does not support the theory that any
 19 individualized impact would be transmitted classwide. *See supra*, pp. 14-17.

20 Plaintiffs have no answer to this. They quote snippets from “documentary evidence and
 21 testimony” to try to show that a Defendant’s policy of differentiating pay based on performance was
 22 trumped by every Defendant’s supposed commitment to maintaining “internal equity.” Mem. at 20.
 23 This assertion is contrary to the evidence of Defendants’ practices. [REDACTED]

24 [REDACTED]” (Stubblefield
 25 Decl. ¶ 12, Ex. B)—an instruction Leamer admitted is inconsistent with his theory of class-wide
 26 harm. Leamer Dep. 464:22-465:14. Others put performance-based rewards first, with internal

27 ⁷ See Stubblefield Decl. ¶¶ 9-17; Morris Decl. ¶¶ 5-16; Burmeister Decl. ¶ 7; McAdams Decl. ¶¶ 15-
 28 18; Wagner Decl. ¶¶ 12, 16; Maupin Decl. ¶¶ 30-37.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 Brown Decl. Ex. 27, cited in Leamer Rept. n. 160. [REDACTED]
5 [REDACTED]

6 Likewise, the Google document Plaintiffs
7 cite (Mem. 3) as supposedly reflecting “concerns about preserving internal equity” actually said the
8 opposite: “Ensure adjustments are meritocratic / not ‘socialistic’ – our current programs highly
9 differentiate cash compensation based on performance.” Shaver Decl. Ex. 45.

10 As Leamer admitted, even where it is a goal, internal equity does not mean “internal *equality*”
11 and does not prevent paying more to higher performing candidates. Leamer Dep. 285:17-19, 296:16-
12 297:25 (emphasis added). Thus, even employers that consider internal equity do not seek to equalize
13 every pay change even among employees in the same category, let alone across all employees in the
14 company. Rather, Defendants look at salaries for similarly situated employees and seek “equity” by
15 ensuring that salaries reflect each employee’s relative skill and contribution level. Consistent with
16 this approach, “internal equity” at Google was understood to mean that employees “should receive
17 equitable compensation treatment based on their performance, and that therefore there should be
18 variation in compensation for each employee that corresponds to each employee’s performance and
19 contribution to the company relative to other employees.” Wagner Decl. ¶ 12. This “internal
20 equity” reflects precisely the opposite of the kind of rigid lock-step scheme suggested by Leamer.

21 None of the other documents cited by Plaintiffs show that any Defendant had a policy of
22 equalizing salary changes across the entire company. Plaintiffs cite, for example, a Pixar document
23 stating that, when a movie studio tries to “grow rapidly” into new areas, like “Dreamworks in 2D
24 animation,” it would affect “pay structure.” Shaver Decl. Ex. 61. But an effect on pay for animators
25 (or even an effect on others at Pixar) says nothing about effects on the thousands of much different
26 jobs in other lines of business, like those of the other Defendants. The Google document Plaintiffs
27 cite (Shaver Decl. Ex. 59) *defends* giving a “bump” in salary to a “top performer” even though it
28 might be perceived as unfair or create “discontinuities” because it is a way to “save your best people,
and send a message to the hiring company that we’ll fight for our best people.” This is the opposite

1 of Plaintiff's theory that a raise for one is a raise for all. Nor does the document's reference to
 2 adopting a "systematic approach" show that even Google had a policy of extending every pay raise
 3 across the entire company. And it is certainly not evidence that any other Defendant had one.

4 Plaintiffs rely most heavily on the Google "Big Bang"—a 10% increase in base salary that
 5 Google presented to its Board in October 2010 and approved effective January 2011. Mem. at 3,
 6 18-19, 22. But that event only proves Defendants' point. Plaintiffs do not offer any evidence that
 7 any other Defendant followed Google's salary increase, and they did not. Murphy Rept. ¶ App'x
 8 3A-B. Google's increase was in response to what Leamer admitted was an "unusual and unique"
 9 circumstance—an unprecedented effort by Facebook, a fast-growing non-defendant that had
 10 recruited 20% of its 2010 new hires from Google. Leamer Dep. 455:15-456:17, 460:7-22. Far from
 11 demonstrating that class-wide impact can be shown by common proof, Google's "unusual and
 12 unique" response to Facebook shows how individualized Plaintiffs' claims are. *Id.*

13 **b. Dr. Leamer's "common factors" analysis proves nothing**

14 Plaintiffs try to shore up their "rigid structure" theory with their expert's purported
 15 "statistical evidence." Mem. at 22. This effort fails. Plaintiffs assert that Leamer's "common
 16 factors" analyses show that compensation was "governed largely by common factors" and "tended
 17 to move together." *Id.* But the "fit" of these regressions—their ability to explain—is almost entirely
 18 attributable to where the employee works and his job title. Leamer Dep. 205:23-207:2. Thus, as
 19 Murphy explains, the regressions simply reflect that, in these labor markets like all competitive ones,
 20 what an employee does and whom she works for explain much of her compensation. Murphy Rept.
 21 ¶¶ 89-92. Despite this, as the actual compensation data show and Murphy explains, there is still
 22 wide variation in compensation earned by employees even with the same job titles, reflecting the
 23 discretionary, individualized nature of compensation decisions by hundreds of managers. *Id.* ¶ 93-
 24 94. If Leamer's regressions truly reflected a rigid compensation structure and explained "nearly all
 25 variability in class member compensation," Leamer Rept. ¶ 130, they would predict accurately the
 26 compensation of the named Plaintiffs. In fact, they are often off by tens of thousands of dollars—
 27 by over \$66,000 in one case. Murphy Rept. ¶¶ 93 & Exs. 34A-B. *See In re Flash Memory Antitrust*
 28 *Litig.*, 2010 WL 2332081, at *10 (N.D. Cal. June 9, 2010) (rejecting regression because "explanatory

1 price correlations predicted ... fail to materialize”).

2 Furthermore, as Leamer conceded, the common factors regressions do not establish that
 3 compensation of different “employees with different job titles are correlated with each other *over*
 4 *time*.” Leamer Dep. 235:21-236:2 (emphasis added); *id.* at 218. Thus, the regressions are irrelevant
 5 to the critical question whether salaries “tended to move together” over time across jobs such that
 6 any individual’s negotiated salary increase would ripple firm-wide. Leamer Dep. 206:4-21. Leamer’s
 7 sole answer to this deficiency is to rely on charts supposedly showing parallel movement of salaries
 8 for certain job titles. Leamer admitted that a “nonrigid wage structure”—one that is “indifferent to
 9 internal equity issues”—could lead to the very same “parallel” lines he claims appear in his charts.
 10 Leamer Dep. at 282:11-283:25. In other words, the graphs Leamer uses as the linchpin of his
 11 “internal equity” analysis cannot distinguish between Leamer’s theory and the exact opposite
 12 conclusion. For that reason alone, they prove nothing, and Plaintiffs are left with no proof that “all
 13 or nearly all” employees were impacted. Moreover, the charts on their face reveal nothing because
 14 they show *average* salaries of all employees in a given job title. They do not show what individual
 15 salaries were doing, which is the critical question plaintiffs must address for class certification. As
 16 the *Reed* court explained, the “issue is the feasibility of common proof regarding individual
 17 [employees], not a hypothetical ‘average’ [employee].” 268 F.R.D. at 592.⁸ Even if relying on
 18 averages were proper, Leamer’s average figures show that salaries moved in different directions, with
 19 some job titles increasing substantially while others decreased—directly the opposite of the
 20 supposed “parallel” salary movement plaintiffs hypothesize.⁹

21 ⁸ *Flash Memory*, 2010 WL 2332081, at *10 (Armstrong, J.) (“looking only at an average price trend ...
 22 obscures individual variations over time among the prices that different customers pay for the same
 23 or different products”); *id.* at *12 (use of averaging is “questionable” since it assumes uniformity
 24 among class members); *Somers v. Apple, Inc.*, 258 F.R.D. 354, 360 (N.D. Cal. 2009) (Ware, J.)
 25 (criticizing “aggregation of data,” which “cannot be reliably applied to the complex product and
 pricing dynamic underlying the claims in this case”); *accord* ABA Section of Antitrust Law,
Econometrics: Legal, Practical, and Technical Issues 220 (2005) (“averages can hide substantial variation
 across individual cases, which may be key to determining whether there is common impact”).

26 ⁹ Leamer produced charts for only the top ten job titles for Apple and Google. He failed to include
 27 any analysis for the thousands of other jobs at Apple and Google, and he included none at all for the
 28 other Defendants. Yet he concluded that each Defendant had a “rigid wage structure” for all job
 titles. In fact, average salaries vary substantially over time between job titles, with salaries often
 moving in opposite directions. Murphy Rept. ¶¶ 98-99 & Exs. 18A-B. Leamer agrees that this
 implies his posited internal-equity driven “wage sharing” process was “not evident” in the charts.

(cont’d)

1 **3. The class includes members who benefited from the alleged conduct,**
 2 **which invalidates the class under both Rule 23(b)(3) and Rule 23(a)(4).**

3 Plaintiffs’ theory of common impact fails for another reason. Plaintiffs and Leamer ignore
 4 the simple fact that, on their theory, many class members would have *benefited* from the challenged
 5 agreements because they faced less competition for a new job or promotion with one of the
 6 Defendants. So, for example, if certain Adobe employees missed out on positions at Apple because
 7 of the alleged agreements, Apple hired other employees for those positions—employees who are
 8 included in the proposed class. Murphy Rept. ¶ 40. In other words, the same conduct that allegedly
 9 harmed the class member who did not receive a job as a result of a cold call benefited the class
 10 member who got that job. *Id.* ¶¶ 38-42. In addition, if one class member could have used a missed
 11 cold call to negotiate a salary increase at his existing job, that would have *decreased* compensation for
 12 his co-workers where their manager had a fixed salary budget. *Id.* ¶¶ 87-88. These class members are
 13 better off than the other class member did not get the cold call. The conflicting effects of the alleged
 14 agreements on different class members could be sorted out only through individualized inquiries.

15 This illustrates another crucial difference between this case and a wage-fixing case. In
 16 contrast to an agreement to charge everyone more for a product (or pay everyone less for a job), the
 17 impact, if any, from cold calling restrictions would mean that that “some class members derive a net
 18 economic benefit from the very same conduct alleged to” harm the rest. *Brown v. Am. Airlines, Inc.*,
 19 2011 WL 9131817, at *11 (C.D. Cal. Aug. 29, 2011) (collecting cases). The existence of these
 20 opposite impacts is “independently sufficient to support the denial of certification.” *Navellier v.*
 21 *Sletten*, 262 F.3d 923, 941 (9th Cir. 2001).

22 **D. Leamer’s “Conduct” Regression Cannot Show Even Generalized Class-Wide**
 23 **Impact.**

24 As explained above, Leamer’s “common factors” fails to satisfy Plaintiffs’ burden to show
 25 that “all or nearly all” class members suffered the same injury. *See Bell Atl.*, 339 F.3d at 302 (need
 26 proof of injury to “every class member”); *see also Hydrogen Peroxide*, 552 F.3d at 311 (requiring injury
 27 to “every class member”). Leamer also purports to show that there was “generalized” class-wide

28 Leamer Dep. 271.

1 impact—*i.e.*, suppression of compensation—and that the alleged agreements caused billions of
 2 dollars in damages. As shown in Defendants’ *Daubert* motion, Leamer’s opinions are so flawed they
 3 are inadmissible. But even if Leamer’s testimony were admissible, this Court would still have to
 4 undertake a rigorous analysis of his opinions to “judg[e] [their] persuasiveness.” *Ellis*, 657 F.3d at
 5 982. Leamer’s methods cannot withstand a superficial analysis, let alone a rigorous one.

6 Leamer’s “conduct” regression does not purport to measure directly the effect of
 7 Defendants’ conduct. Instead, his regression takes Defendants’ compensation data and controls for
 8 certain factors (such as certain employee characteristics and macroeconomic factors) for the periods
 9 before, during, and after the class period. It then attributes *any* remaining difference in
 10 compensation during the class period to the alleged agreements. Murphy Rept. ¶¶ 110-114.
 11 Although regressions can be acceptable statistical tools if used properly, Leamer’s regression fails
 12 even basic scrutiny.

13 *First*, Leamer’s report states that “all or nearly all” employees suffered reduced
 14 compensation, and his regression analysis purports to show generalized damages of the classes as a
 15 whole. In his deposition, the only number he could confidently assign to his opinion on the
 16 generalized reach of the conspiracy was “greater than 50%.” Leamer Dep. 32:20-33:10. “Greater
 17 than 50%” does not meet the requirement of showing “all or nearly all.” More important, under
 18 Leamer’s new claim that only some percentage over 50% suffered wage suppression, almost half of
 19 Defendants’ employees may not have been injured at all. And Leamer offers no mechanism for
 20 distinguishing the injured from the uninjured. In fact, he admits that his methodology cannot show
 21 that any individual class member was harmed. Leamer Dep. 43:2-25, 44:10-25; 56:16-57:11.

22 *Second*, Leamer averaged his results across all Defendants. This is highly misleading because
 23 averaging covers up precisely the question Leamer must answer—whether all class members were
 24 injured by the alleged conduct. Leamer admitted in his deposition that he ran his model separately
 25 for each Defendant, but claimed he could not “remember the details” of the results and did not
 26 report the outcome in his report. Leamer Dep. 360:23-361:4. Defendants’ expert conducted
 27 Defendant-specific tests using the same data and replicating the same methodology. The results are
 28 remarkable. Of the seven Defendants, two show overcompensation in all years and three show a

1 mix of over- and under-compensation depending on the year. Murphy Rept. ¶ 116 & Ex. 20. In
 2 other words, Leamer's model concludes that about half the time Defendants *overpaid* their employees
 3 *because of the alleged agreements*. This is nonsense, and Leamer admitted as much. As he put it, such a
 4 result "would raise concerns" about "the conceptual framework and the appropriateness of the
 5 model." Leamer Dep. 472:23-473:7. In fact, it shows that his model is meaningless and no
 6 "common proof" at all. *See GPU*, 253 F.R.D. at 504 (finding plaintiffs' regressions "would either be
 7 overly reliant on averages and would thus sweep in an unacceptable number of uninjured plaintiffs,
 8 or they would be unmanageably individualized."); *Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 431
 9 (E.D. Wis. 2001) ("[R]eliance on aggregate data illustrates the perils and misuses of statistical
 10 analysis. If Microsoft-founder Bill Gates and nine monks are together in a room, it is accurate to say
 11 that on average the people in the room are extremely well-to-do, but this kind of aggregate analysis
 12 obscures the fact that 90% of the people in the room have taken a vow of poverty."). Just as
 13 "[i]nformation about disparities at the regional and national level d[id] not establish the existence of
 14 disparities at individual stores" in *Dukes*, 131 S. Ct at 2555, Leamer's purported showing of impact
 15 aggregated across all Defendants, job categories, and employees does not reliably establish the
 16 existence of impact for any Defendant or job category, much less any individual. *See also Ellis*, 657
 17 F.3d at 983 (disparities in only 2 of 8 regions would preclude commonality in nationwide class).

18 *Third*, Leamer's regressions assume the compensation of each individual employee is entirely
 19 independent of that of other employees. Murphy Rept. ¶¶ 120-127. This is not reconcilable with his
 20 own (false) theory that compensation of all employees moves together. It also fails to use an
 21 elementary standard error correction technique called "clustering," which Leamer's academic work
 22 cautions statisticians to use. *Id.* ¶ 125-127. Correcting for this single mistake renders *all* Leamer's
 23 under-compensation results statistically indistinguishable from zero. *Id.* ¶ 127.

24 *Fourth*, Leamer fails to control for obvious factors that affect compensation, causing him to
 25 attribute compensation changes to the alleged agreements when they are the result of these other
 26 factors. *Id.* ¶¶ 134-137. For example, even though stock and stock options were a major
 27 component of many employees' compensation, Leamer does not control at all for changes in the
 28 value of equity compensation. Simply adding the change in the S&P 500 as a variable in his

1 regression alters his results dramatically. For the class of “technical” employees, his corrected
 2 regression again estimates that Defendants as a whole *overcompensated* their employees because of the
 3 alleged agreements. *Id.* ¶ 137 & Ex. 26.

4 *Finally*, Leamer cherry-picked his “benchmark” periods. *Id.* ¶ 133. If only the post-class
 5 period is used as the “benchmark,” Leamer’s regression estimates virtually no *undercompensation*,
 6 but rather *overcompensation*. *Id.*

7 **E. Plaintiffs’ Inability To Show They Can Establish Damages On A Class-Wide**
 8 **Basis Reinforces The Predominance Of Individualized Issues.**

9 Proof of “some approximation of damage” also is an essential element of plaintiffs’ antitrust
 10 claims. *E.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981). Leamer admits that
 11 his regressions cannot estimate damages on an individual basis, and he has offered no methodology
 12 for doing so. *E.g.,* Leamer Dep. 23:23-24:7, 398:21-399:11. While the Ninth Circuit has held that
 13 the need for individualized “damage calculations alone cannot defeat certification,” *Yokoyama v.*
 14 *Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010), the Supreme Court soon may decide
 15 that issue. *Comcast Corp. v. Behrend*, No. 11-864 (argued Nov. 5, 2012).¹⁰

16 **II. RULE 23(b)(3)’S SUPERIORITY REQUIREMENT IS NOT SATISFIED.**

17 The “numerous and substantial separate issues” each class member would have to litigate to
 18 “establish his or her right to recover individually” means that “class action treatment is not the
 19 ‘superior’ method of adjudication.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir.
 20 2001). Plaintiffs have presented no viable means to determine antitrust impact or damages class-
 21 wide. Lumping all employees’ claims together would violate the Rules Enabling Act. 28 U.S.C.
 22 § 2072(b); *see Dukes*, 131 S. Ct. at 2561. And it would violate Defendants’ due process right to assert
 23 “every available” defense against each class member. *See Lindsey v. Normet*, 405 U. S. 56, 66 (1972).
 24 As a result, class treatment of Plaintiffs’ claims would be unmanageable.

25 **CONCLUSION**

26 The motion for class certification should be denied.

27 ¹⁰ Plaintiffs’ claim that they can show “aggregate damages” (Mem. at 23) conflicts with the Ninth
 28 Circuit’s recognition that “allowing gross damages” in a class case is “prohibited by the [Rules]
 Enabling Act,” *Hotel Tel.*, 500 F.2d at 90, and with *Dukes*’ disapproval of “Trial by Formula” to
 calculate an “entire class recovery ... without further individualized proceedings.” 131 S. Ct. at 2561.

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2 O'MELVENY & MYERS LLP

3 By: /s/ Michael F. Tubach
4 Michael F. Tubach

5 GEORGE A. RILEY (Bar No. 118304)
6 griley@omm.com
7 MICHAEL F. TUBACH (Bar No. 145955)
8 mtubach@omm.com
9 LISA CHEN (Bar No. 234681)
10 lisachen@omm.com
11 CHRISTINA J. BROWN (Bar No. 242130)
12 cjbrown@omm.com
13 O'MELVENY & MYERS LLP
14 Two Embarcadero Center, 28th Floor
15 San Francisco, CA 94111-3823
16 Telephone: (415) 984-8700
17 Facsimile: (415) 984-8701

18 Attorneys for Defendant Apple Inc.

19 By: /s/ Lee H. Rubin

20 LEE H. RUBIN (Bar No. 141331)
21 lrubin@mayerbrown.com
22 DONALD M. FALK (Bar No. 150256)
23 dfalk@mayerbrown.com
24 EDWARD D. JOHNSON (Bar No. 189475)
25 wjohnson@mayerbrown.com
26 MAYER BROWN LLP
27 Two Palo Alto Square, Suite 300
28 Palo Alto, CA 94306-2112
Telephone: (650) 331-2000
Facsimile: (650) 331-2060

KRISTEN A. ROWSE (Bar No. 235294)
krowse@mayerbrown.com
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Attorneys for Defendant Google Inc.

1
2 By: /s/ Robert A. Mittelstaedt

3 ROBERT A. MITTELSTAEDT (Bar No. 60359)
4 ramittelstaedt@JonesDay.com
5 CRAIG E. STEWART (Bar No. 129530)
6 cestewart@JonesDay.com
7 JONES DAY
8 555 California Street, 26th Floor
9 San Francisco, CA 94104
10 Telephone: (415) 626-3939
11 Facsimile: (415) 875-5700

12 CATHERINE T. BRODERICK (Bar No. 251231)
13 cbroderick@jonesday.com
14 JONES DAY
15 1755 Embarcadero Road
16 Palo Alto, CA 94303
17 Telephone: (650) 739-3939
18 Facsimile: (650) 739-3900

19 Attorneys for Defendant Intuit Inc.

20
21 By: /s/ Emily Johnson Henn

22 ROBERT T. HASLAM (Bar No. 71134)
23 rhaslam@cov.com
24 EMILY JOHNSON HENN (Bar No. 269482)
25 ehenn@cov.com
26 COVINGTON & BURLING LLP
27 333 Twin Dolphin Dr., Suite 700
28 Redwood Shores, CA 94065
Telephone: (650) 632-4700
Facsimile: (650) 632-4800

DEBORAH A. GARZA (pro hac vice)
dgarza@cov.com
Thomas A. Isaacson (pro hac vice)
tisaacson@cov.com
Chinue Turner Richardson (pro hac vice)
crichardson@cov.com
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue NW
Washington, DC 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Attorneys for Defendant Pixar